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No. 82-1930

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

GEORGE L. REICHERT and ROBERT E. METLER,
Petitioners,

v.

VILLAGE OF MORTON GROVE, *Respondent,*

BRIEF OF AMICI STATES OF ALABAMA, ALASKA, ARIZONA, HAWAII, IDAHO, LOUISIANA, MONTANA, NEBRASKA, NEVADA, VERMONT, WEST VIRGINIA AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI

This case is on petition for a writ of certiorari from the United States Court of Appeals for the Seventh Circuit which affirmed the decision of the District Court for the Northern District of Illinois, Eastern Division. The district court, in complete disregard of the long established doctrine of abstention, decided the validity of a local ordinance on state constitutional grounds. Although the opinion also upheld the ordinance on federal constitutional grounds, twenty-two of the twenty-five pages of the opinion dealt with the interpretation of a unique provision of the Illinois Constitution. The Court of Appeals opinion, in affirming the district court's decision, also dwelt at length with the interpretation of the state constitutional provision. Moreover, the Court of Appeals, in disposing of the abstention issue, erroneously construed the *Pullman* doctrine as it applies to this case.

Amici states are vitally interested in the preservation of the traditional principles of comity and federalism as well as the proper allocation of powers between the federal and state judiciary. Amici believe that unless vacated or reversed, the Court of Appeals opinion and the District Court decision set an erroneous and dangerous precedent wherein unsettled questions of state constitutional law are interpreted first by the federal courts, thereby preempting the state courts and their sovereign prerogative to interpret their unique constitutional provisions.

Amici strongly urge this Court to heed the views of the Amici states and give due consideration to the fundamental principles raised in their brief.

SUMMARY OF ARGUMENT

The abstention doctrine preserves the proper balance between the respective roles of the federal and state courts. The federal courts should not lightly interpret unique state constitutional provisions concerning state police power

without affording the state courts the opportunity to interpret them first. The decisions of the Court of Appeals and the District Court offend these considerations of federalism and comity, and they must be reversed and vacated.

ARGUMENT

I.

THE ABSTENTION DOCTRINE MUST BE CONSIDERED

The abstention question was not addressed by the district court in its final opinion. It was addressed by the Court of Appeals. See *Quilici v. Village of Morton Grove* 695 F.2d 261 265 n.2 (1982). Although the parties may not have raised it in the Courts below, federalism and prudential considerations require that in an appropriate case an appellate court may consider that issue *ex mero motu* and mandate abstention even when parties have not raised it. *AFA Distrib. Co. V. Pearl Brewing Co.*, 470 F.2d 1210 (4th Cir. 1973); *Chicago, Burlington & Quincy R.R. v. City of North Kansas*, 276 F.2d 932 (8th Cir. 1960). Furthermore, this Court may consider an issue raised solely by amici states in deciding the merits of a case. *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 368 n. 3 (1977).

Indeed, in many instances the abstention issue was raised for the first time in this Court by the Court *sua sponte*. *See City of Meridian v. Southern Bell*, 358 U.S. 639 (1959); *Albertson v. Millard*, 345 U.S. 242 (1953); *City of Chicago v. Fieldcrest Dairies*, 316 U.S. 168 (1942);[1] *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

The necessity for the appellate court to consider abstention on its own motion is grounded on basic principles of federal jurisdiction and federalism. It is fundamental that the lack of jurisdiction can be raised by the court at any time. Although the abstention doctrine does not always implicate the Article III case or controversy requirements,

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[1] *The Fieldcrest Dairies* case concerned a city ordinance, not unlike the ordinance involved here.

it is grounded on an equally important consideration going to the exercise of jurisdiction, i.e. prudential considerations and the policy of judicial self-restraint. As this Court emphasized in *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101,105,(1944):

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality. . . unless such adjudication is unavoidable. And so, as questions of federal consitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. See, also, *Leiter Min., Inc. v. United States*, 352 U.S. 220 (1958).

It is, therefore, plain that the prudential consideration going to the invoking of the abstention doctrine must be put on the same plane as the prudential considerations going to the doctrine of standing and ripeness. See, *e.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). These considerations go to the fundamental question concerning the exercise of federal jurisdiction and must be determined by this Court even when they are not raised by the parties.

II.
ABSTENTION IS REQUIRED HERE

An unbroken line of cases has undisputedly established the requirement that when the federal constitutionality of a state law under challenge may be avoided by the interpretation of that state law on state law grounds, that state law should be first interpreted by the state court. This abstention doctrine, commonly known as the *Pullman* doctrine, was first enunciated by the Supreme Court in *Railroad Comm'n. of Texas v. Pullman Co.*, 312 U.S. 496 (1941):

> The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplemented by a controlling decision of a state court. The resources of

equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

The facts in this case are similar to this Court's decision in *City of Meridian v. Southern Bell, supra.* In that case, a federal district court, in construing a Mississippi statute, held that it violated both the state and federal constitutions. This Court vacated that decision and said:

> Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. * * * That is especially desirable where the questions of state law are enmeshed with federal questions. * * * Here, the state law problems are delicate ones, the resolution of which is not without substantial difficulty – certainly for a federal court. * * * In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand lest it render a constitutional decision unnecessarily. *Id.*, at 640-641.

Several years later, in a case where the validity of a challenged state law was again questioned under both state and federal constitutional grounds, the Supreme Court restated the doctrine in *City of Meridian* and reversed the district court's ruling on the constitutionality of an Alaskan law regulating fishing. The Court emphasized:

> The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution. * * * We appreciate why the District Court felt concern over the effect of further delay on the plaintiffs, the appellees here; but we have concluded that the first judicial application of these constitutional provisions should properly be by an Alaska Court. *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970). See, also, *Askew v. Hargrave*, 401 U.S. 476 (1971).

Another fundamental policy consideration requiring abstention in cases as this one is the long established policy of judicial self-restraint in not deciding federal constitu-

tional questions unless it is strictly necessary. As this Court explained in its seminal decision in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947):

> The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.
>
> All these considerations and perhaps others, transcending specific procedures, have united to form and sustain the policy. Its execution has involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which deferring decision very often entails. On the other hand it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme. For premature and relatively abstract decisions, which such a policy would be most likely to promote, have their part, too, in rendering rights uncertain and insecure. *Id* at 571.

III.

THE STATE CONSTITUTIONAL PROVISION IS UNIQUE

Amici are not advocating that abstention is always necessary whenever a state constitutional provision is implicated. In some cases when the state constitutional provision mirrors a Federal Consitutuional provision, abstention may not be required. However, in this case, the Illinois Constitutional provision is unique. Article I, § 22 of the Illinois Constitution provides:

> *Right to Arms*
>
> Subject only to the police power, the right of the individual citizen to keep and bear Arms, shall not be infringed.

This provision is markedly different from the Second Amendment to the United States Constitution, which states:

> A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.

The Illinois constitutional provision does not refer to the *Militia*, and more importantly, it specifically refers to the police power. That police power could only mean the state's police power. Therefore, the limitation of the right to bear arms, in that state constitutional provision, must depend on the parameter of the state's police power, to be first construed by the Illinois courts and not the federal court. The uniqueness of the Illinois constitutional provision, therefore, is not different from the provision in the Alaska Constitution regarding fishing in the *Reetz* decision. These constitutional provisions go uniquely to the state's interest in regulating the conduct of its people. Until definitively construed by the state courts, the federal judiciary should stay its hand and avoid unnecessarily and prematurely usurping the state's prerogatives.

IV.

THE COURT OF APPEALS' ABSTENTION ANALYSIS IS ERRONEOUS

The Court of Appeals disposed of the abstention issue by characterizing the doctrine as one whose application depends on the importance of the right alleged to be involved in the lawsuit.[2] Although some decisions lend support to this analysis, they do not support the action of the Court of Appeals in reaching the merits of the *state constitutional* challenge. Assuming, *arguendo*, that a federal court may choose not to abstain because fundamental *federal* rights are involved, that decision not to abstain allows the federal court to reach the merits of the *federal* constitutional challenge raised in the lawsuit. That exercise of discretion does not always carry with it the mandate to decide the state law or state constitutional claim raised. The federal interpretation of a state constitutional provision which has not been definitively construed by the state's highest court usurps the prerogative of that court and offends considerations of federalism and comity. Article III of the Constitution does not endow the federal judiciary with the power to construe state constitutional provisions.[3] The power to reach state law claims comes under the "pendent jurisdiction" concept. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). That jurisdiction, grounded on policy considerations of judicial administration as well as convenience and fairness to litigants, when measured against the limited grant of jurisdiction to federal courts in Article III, must be

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[2] The Court of Appeals opinion is internally inconsistent. In denying abstention it considered the issue of gun control of vital importance to every citizen and compared it to fundamental federal constitutional rights such as voting, racial equality or rights of expression. Yet, the opinion summarily rejected the petitioners' federal constitutional claims under the 2nd and 9th Amendments.

[3] Even in diversity cases, a federal court is required to *apply* state law as determined by the state's highest court and cannot reinterpret state law as it chooses. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956).

narrowly exercised in situations where the state law claim concerns unsettled questions of state law, particularly when unique state constitutional questions are presented.

In this case, assuming the correctness of the Court of Appeals decision as to the need for the federal court to decide the important federal rights raised in the lawsuit, the courts below should have decided the lawsuit on the federal constitutional grounds alone, leaving the state constitutional questions for the state judiciary to decide. Although this approach may result in some unfairness to the litigants in not having all their claims decided in one forum, that disadvantage is far outweighed by the important federalism and comity concerns this approach will protect and preserve.

CONCLUSION

In the interest of federalism and comity amici states urge this court to vacate the decision below and order the district court to abstain from deciding the federal constitutional questions in order for the state court to decide the state constitutional challenge first. Alternatively, the decisions below on state constitutional grounds must be vacated.

Respectfully submitted this 30th day of June, 1983.

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